



# ENABLE Scotland

Leading the way in learning disability

## Consultation on proposals for an offence of wilful neglect or ill Treatment in Health and Social Care Settings ENABLE Scotland Response – January 2015

### **About ENABLE:**

ENABLE Scotland is the largest voluntary organisation in Scotland of and for children and adults who have learning disabilities and their families. We have a strong voluntary network with around 5000 members in 44 local branches and via individual membership.

Around a third of our members have a learning disability. ENABLE Scotland campaigns to improve the lives of people who have learning disabilities and their families and carers. ENABLE Scotland provides social care services to more than 2,000 people across Scotland who have learning disabilities or mental health problems.

### **In Summary:**

ENABLE Scotland welcomes the proposed introduction of a new offence of wilful neglect or ill-treatment in health and social care settings. We advocate that the proposed offence should apply across the spectrum of health and social care provision in both formal and informal settings. ENABLE Scotland would emphasise that this proposed new offence must fit properly with existing landscape of protection arrangements without creating duplication or unintended gaps.

ENABLE Scotland would highlight that while the creation of this new offence is a positive step, more needs to be done to address the practical challenges associated, the most prominent being the fundamental need for procedures which would enable individuals to make a complaint about conduct in a health and social care setting.

**Do you agree with our proposal that the new offence should cover all formal health and adult social care settings, both in the private and public sectors? Please explain your views.**

Yes  No

ENABLE Scotland agrees that the proposed new offence should cover all formal health and adult social care settings, this would provide consistency and ensure protection for individuals receiving health and social care across all settings.

ENABLE Scotland would emphasise that the offence should cover all health and social care settings; this would include the health and social care settings provided by the third/voluntary sector. We would suggest that those health and social care settings listed at paragraph [10] should include, but not be limited to, those settings regulated by the care inspectorate and/or SSSC registered.

ENABLE Scotland would enquire whether there is existing legislation that exists to protect children and adults from wilful neglect or ill-treatment in educational settings; and whether similar gaps exist in this context. ENABLE Scotland would suggest that it is worthwhile considering whether the provisions of the proposed new offence should extend to education professionals and educational settings.

Of the professions listed in Annex A as being covered by the proposed offence, whilst not exhaustive the list mentions 'student opticians', ENABLE Scotland would suggest that all student/trainee practitioners be included in that list.

ENABLE Scotland would emphasise that this proposed new offence must fit properly with existing landscape of protection arrangements without creating duplication or unintended gaps.

**Do you agree with our proposal that the offence should not cover informal arrangements, for example, one family member caring for another?**

Yes  No

ENABLE Scotland urge that informal arrangements should be included in the proposed new offence. People are vulnerable to ill-treatment and neglect in informal care settings. We feel that it would be a missed opportunity to exclude informal care arrangements, and would urge that people receiving informal/family care should not be exempt from protection offered by the proposed new offence.

There is a human rights obligation on Scottish Government to protect individuals from treatment that would amount to degrading and inhuman treatment. This would apply to harm in all settings. At paragraph [5] in the consultation document Scottish Government recognises that there are gaps in current legislation. ENABLE Scotland would emphasise that the gaps which exist apply to both formal and informal care arrangements.

On this point ENABLE Scotland would stress that legislation must be framed carefully to ensure it does not criminalise carers who are not getting adequate support. We would emphasise that there is a difference between 'wilful neglect' and not coping. Family carers must receive adequate and appropriate support to carry out their caring role, failure to do so leads to the burden of care becoming too much and leaves carer and cared-for person vulnerable.

**Should the new offence cover social care services for children, and if so which services should it cover? Please list any children's services that you think should be excluded from the scope the offence and explain your view.**

Yes  No

ENABLE Scotland agree that the new offence should cover all health and social care services provided for children with no exceptions. Children are particularly vulnerable to abuse by adults, particularly those who are in a position of trust and responsibility such as health and social care professionals. We would also refer to our point made in question 1, as to whether there is existing legislation that exists to protect children and adults from wilful neglect or ill-treatment in educational settings; and whether similar gaps exist in this context. ENABLE Scotland would suggest that it is worthwhile considering whether the provisions of the proposed new offence should extend to education professionals and educational settings.

Article 19 of the United Nations Convention on the Rights of the Child (UNCRC) states that children have the right to be protected from being hurt and mistreated, physically or mentally. Governments should ensure that children are properly cared for and protect them from violence, abuse and neglect by their parents, or anyone else who looks after them. The proposed legislative changes help to uphold and promote Article 19.

UNCRC Article 23 (Children with disabilities) says that children who have any kind of disability have the right to special care and support, as well as all the other rights in the Convention, so that they can live full and independent lives. Children with disabilities are more likely to be receiving health and social care services than their non-disabled peers. It is therefore appropriate that the proposed changes take cognizance of the fact that disabled children in receipt of any type of health and social care service should be fully protected from harm and neglect under the law.

ENABLE Scotland would emphasise that this proposed new offence fit properly with existing landscape of child protection arrangements without creating duplication or unintended gaps.

**Should the offence apply to people who are providing care or treatment on a voluntary basis on behalf of a voluntary organisation?**

Yes  No

ENABLE Scotland believe that the offence should apply to people who are providing care or treatment on a voluntary basis on behalf of a voluntary organisation. Where there is a working agreement in place between the voluntary organisation and the volunteer, this should be treated as a formal arrangement and should be covered by the new offence. E.g. ENABLE Scotland's Lend-a-Hand family respite service in Fife matches volunteer families with families of disabled children. The children spend time, including overnight and weekend stays, with the volunteer family. Working agreements are in place for all the volunteer families and

they must undergo a robust training and recruitment procedure before being approved. Services of this nature are formal (although unpaid) arrangements providing a quality service and should be covered by the new offence.

**Do you agree with our proposal that the new offence should concentrate on the act of wilfully neglecting, or ill-treating an individual rather than any harm suffered as a result of that behaviour?**

Yes  No

ENABLE Scotland agree with this proposal for the reasons set out in the consultation paper. Also the harm caused may be psychological which does not leave visible scars but which nevertheless can result in significant damage to the victim's emotional and mental well-being. If the neglect or ill-treatment occurs in childhood, the damage inflicted by this can impact on the child's ability to form loving attachments and can affect the quality of relationships throughout their whole life. This type of harm is impossible to quantify at the time the offence occurs, in fact it may not become apparent until a much later date. Therefore it follows that the offence should not be based on the level of visible or quantifiable harm, but on the actions of the perpetrator(s).

**Do you agree with our proposal that the offence should apply to organisations as well as individuals?**

Yes  No

It will be essential to be able to hold organisations to account as well as individuals. Applying the offence to organisations as well as individuals may go some way to prevent employees becoming "scapegoats", when in fact their actions had been constrained by the management or organisational practices of their employer, for example by providing inadequate training or induction. It should be noted that organisations can also be vulnerable to 'scapegoating' by individuals facing criminal charges.

**How, and in what circumstances, do you think the offence should apply to organisations?**

Yes  No

The offence should apply to organisations where policies or procedures, or lack thereof, have contributed to harm e.g. if they have failed to carry out PVG checks on employees, or not taken up references.

Legislation and/or guidance will need to differentiate between organisations' responsibilities and individuals' responsibilities. As an example, organisations would be responsible for providing correct detailed support plans, adequate training and support & supervision; whilst individuals would be responsible for acting as they have been trained, reading and applying the support plans, and bringing issues to the attention of their supervisor. There are some scenarios which are always going to be the responsibility of the individual, particularly within the context of 'ill-treatment' where common sense would apply to appropriate and inappropriate treatment of another human being.

ENABLE Scotland suggest that a regulatory body would have responsibility to oversee organisations which could be the subject of the proposed new offence. An example of how this could be applied to organisations would be looking at the measures used by the Information Commissioners Office in regulating the Data Protection Act 1998. This arrangement allows for organisations to self report; for third party reporting; and an organisation can request a procedures audit. The regulator has the power to impose fines, instruct measures to be put in place.

The regulatory body should be able to monitor the severity and frequency of offences and to impose penalties. If there has been an incident of wilful neglect or ill-treatment by a staff member then procedures should include an internal investigation to determine if the organisation has in anyway contributed; the regulator should also be able to carry out such investigations in these circumstances.

**Do you agree that the penalties for this offence should be the same as those for the offences in section 315 of the Mental Health (Care and Treatment) (Scotland) Act 2003 and section 83 of the Adults with Incapacity (Scotland) Act 2000?**

Yes  No

Yes. This approach would be appropriate to ensure consistency and accountability.

**Should the courts have any additional penalty options in respect of organisations? If so, please provide details of any other penalty options that you think would be appropriate.**

Yes  No

Where an offence has been committed, the organisation should be required to make improvements to their systems within a certain timescale and that this procedure is monitored by the Care Inspectorate (or other regulatory body). If the improvements are not made, the organisation can incur further penalties or the service be closed down. This already happens in the case of care services regulated by the Care Inspectorate and should be extended to include all health and social care services.

Courts should be able to impose fines and restrictions on the organisation. One

appropriate restriction which could be applied might be making the organisation ineligible to tender for any contracts in the local authorities where an offence has been committed for a prescribed period of time or indefinitely depending on the nature and severity of the offence.

**What issues or opportunities do the proposed changes raise for people with protected characteristics (age; disability; gender reassignment; race; religion or belief; sex; pregnancy and maternity; and sexual orientation) and what action could be taken to mitigate the impact of any negative issues?**

The proposed legislation raises an opportunity to enhance protection for people with protected characteristics, as these groups are most vulnerable whilst receiving care.

While the proposed changes provide a recourse to justice where offences have been committed, there is no provision for a platform for these groups to access police or legal assistance should they require intervention from neglect or ill-treatment at the hands of carers. Legislation and subsequent guidance must address a fundamental need for procedures which would enable individuals to make a complaint about conduct in a health and social care setting.

ENABLE Scotland would highlight that there will be individuals, whom this act is intended to protect, who may not speak up, for various reasons, when they are being subject to neglect or ill-treatment. We emphasise that there is role for advocacy services and the third sector to play in informing people of their rights and providing platforms for disclosure of unlawful conduct experienced. An example of this in practice would be the third party reporting procedures put in place with respect to hate crime reporting. ENABLE Scotland would suggest that a similar procedure could apply with respect of this proposed legislation.

ENABLE Scotland would also emphasises that careful consideration should be given to how people who lack capacity in certain circumstances can access justice without incurring the financial cost of putting a guardian in place.

ENABLE Scotland would be happy to discuss these comments further and inform the process of developing legislation and guidance.